



Privy Council decision in *Singularis Holdings v PwC* – "Modified universalism" alive, but severely pruned!

The Privy Council handed down its judgment on 10 November 2014 in *Singularis Holdings Limited v PricewaterhouseCoopers*.

This and a related case, *Saad Investments Company Limited v PricewaterhouseCoopers*, were both appeals of November 2013 decisions of the Bermudian Court of Appeal and impact on the ability and scope of the court to assist foreign liquidators. This has been a topic of heated debate for lawyers and cross border insolvency professionals in recent years since the concept of "modified universalism" was put forward by Lord Hoffman in *Cambridge Gas*. The cross-border insolvency community has been anxiously waiting for further clarity with regards to assistance courts can and will give to foreign liquidators following the apparently conflicting decision in *Rubin*.

The Privy Council has decided in this case, by a three to two majority, that there is a common law power to assist a foreign court by ordering the production by third parties of information in both oral and documentary form, albeit with significant limits and conditions. While all 5 members of the Privy Council reaffirmed the concept of modified universalism, only Lords Sumption, Collins and Clarke found in favour of the common law power to assist foreign office holders, whilst Lords Neuberger and Mance thought that no such power exists.

Steve Akers, Hugh Dickson and Mark Byers from Grant Thornton are the joint liquidators of both Saad Investments Company Limited ("SICL") and Singularis Holdings Limited ("Singularis"), which are in official liquidation in the Cayman Islands. In each of these cases, the liquidators were seeking the production of information and documents from an exempted PricewaterhouseCoopers partnership in Bermuda, ("PwC") whose Dubai branch audited the companies' accounts.

The liquidators had previously obtained orders of the Cayman Court under s103 of the Cayman Islands Companies Law requiring PwC to provide copies of the companies' documents in their possession, that being the extent of the liquidators' powers under Cayman legislation. Prior to the

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appointment of the liquidators, Maan Al Sanea, the beneficial owner of SICL and Singularis, removed both companies' accounting, correspondence and legal records from the control of the Swiss based management company handling the day to day affairs of the companies and transported them to Saudi Arabia. Attempts to gain access to them in Saudi Arabia so far been unsuccessful and so the records held by PwC represent the next best source of information as to the assets and liabilities of the companies. PwC refused to cooperate voluntarily with providing access to its audit and other files.

In the case of Singularis, where there was no possibility of an ancillary winding-up order in Bermuda, the question arose as to whether the Bermudian Court could grant the liquidators of Singularis the wider powers available under s195 of the 1981 Bermuda Companies Act. The Privy Council was unanimous in dismissing the liquidators' appeal despite three of their Lordships being in favour of the proposition of a common law power to provide such documents and information. This was because of the limitation they placed on the degree of assistance a court can give a foreign liquidator, namely that "the proper use of the power of assistance should not extend so far as to make good a limitation on the powers of a foreign court of insolvency jurisdiction under its own law" (Lord Collins). In other words, the liquidators could not get in Bermuda that which they could not get in the Cayman Islands.

Lord Sumption's judgment sets out a lengthy evaluation of the genesis and development of "modified universalism", which ultimately leads him to conclude that *Cambridge Gas* represents the extreme view of the scope of the common law power to assist. He does however agree that the concept of modified universalism is in the public interest, and that a common law power to assist foreign liquidators does exist, but he warns that the recognition of such a common law power to provide information to foreign office holders should not lead to the promiscuous creation of other common law powers to compel the production of information. He then sets out four reasons why that power is limited:

- 1) It is only available to assist the officers of a foreign court of insolvency jurisdiction or equivalent. It is therefore not available to assist a voluntary winding up as he views that as essentially a private arrangement.
- 2) It exists only for the purpose of enabling the foreign court to surmount the problems posed for a worldwide winding up of the company's affairs by the territorial limits of each court's powers.
- 3) It is available only when it is necessary for the performance of the officeholders' functions.
- 4) The power is subject to the limitation in *re African Farms, HIH and Rubin*, such that an order must be consistent with the substantive law and public policy of the assisting court.

He went on to say that it followed "common law powers of this kind are not a permissible mode of obtaining material for use in actual or anticipated litigation". He also made it clear that the use of

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such compulsive powers against an innocent third party was conditional on the applicant being prepared to pay the third party's reasonable costs.

Lord Collins, whilst supporting Lord Sumption's version of modified universalism and his conclusion that there is a common law power to assist foreign liquidators, analyses in some detail why the string of cases *African Farms*, *Impex*, *BCCI*, *HIH* and *Cambridge Gas* are not in fact support for development of a common law jurisdiction to grant assistance to a foreign liquidator as if the foreign company were being wound up locally on an "as if" basis. He agreed with Auld JA who said in his Bermuda Court of Appeal judgment that this would be impermissible "legislation from the bench".

A key theme through the judgments in favour of modified universalism is that the developments of common law powers to assist in cross border insolvencies should be measured and should only be permitted where they support a recognised legal principle. In other words, small steps, not radical changes. What seems clear from these judgments is that their Lordships see the common law powers that can be used in support of modified universalism as at best filling in the gaps of the existing statutory framework. Their Lordships did not see it as their role to develop the common law to the extent of assisting a foreign court by doing whatever it could have done in a domestic liquidation.

Thus what we are left with is very limited in nature, essentially a common law basis for giving extra territorial reach to the statutory provisions of the home jurisdiction of the foreign liquidator, so long as they do not conflict with public policy of the assisting jurisdiction. That is a long way from Lord Hoffman's aspirational vision in *Cambridge Gas*.

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